

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-1660

STANLEY BLACKLEDGE, Warden,
Central Prison, Raleigh, N.C. and
STATE OF NORTH CAROLINA,
Petitioner,

v.

JIMMY SETH PERRY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JUNE 11, 1973
CERTIORARI GRANTED OCTOBER 15, 1973

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RELEVANT DOCKET ENTRIES

Date Order or
Judgment Noted

6/25/71 Fil. & ent. APPLICATION FOR WRIT OF
HABEAS CORPUS

7/9/71 Fil. & ent. ANSWER TO PETITION and
MOTION TO DISMISS

8/17/71 Fil. & ent. MEMORANDUM OPINION
and ORDER — Respondent's
motion to dismiss petition
ALLOWED.

8/26/71 Fil. & ent. NOTICE OF APPEAL by
petitioner, . . .

1/19/72 Fil. & ent. . . . of JUDGMENT and OPIN-
ION of the U.S. Court of
Appeals, vacating the order of
the District Court, and remand-
ing the case to the District
Court for further consideration
of petitioner's claim upon its
merit . . .

5/9/72 Fil. & ent. ORDER that James Keenan,
Atty. at Law, Durham, N.C., be
appointed to represent the peti-
tioner in this action . . .

7/12/72 Fil. & ent. petitioner's AMENDMENT TO
APPLICATION FOR WRIT OF
HABEAS CORPUS

7/20/72 Fil. & ent. BRIEF ON BEHALF OF
PETITIONER . . . by Atty.
Keenan

7/26/72 Fil. & ent. . . . SUPPLEMENTAL
ANSWER

8/24/72 Fil. & ent. MEMORANDUM OPINION
AND ORDER that the sentence
imposed by the Superior Court
in this case for the felony of
assault with a deadly weapon
with intent to kill resulting in
serious bodily harm on October
29, 1969, is vacated.

8/30/72 Fil. & ent. NOTICE OF APPEAL

4/11/73 Fil. certified copy of MEMORANDUM
DECISION of the U.S. Fourth
Circuit Court of Appeals,
affirming order of the District
Court.

TRANSCRIPT OF PLEA

The Transcript of Perry's plea is set out in the Petition
for Certiorari at pages 9-11.

RELEVANT PORTION OF PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

1. That the petitioner was brought to trial on or about August 20, 1969, in the District Court for Northampton County, on a charge of assaulting a fellow inmate at the Odom Farm Unit of the North Carolina Department of Correction. That upon conviction the petitioner was given a six months sentence. That due to the fact that he was told that this six months was a consecutive sentence he appealed same to Northampton Superior Court. That he was tried and sentenced for a misdemeanor in Northampton District Court.

2. That on October 29, 1969, the petitioner was brought to trial in Northampton Superior Court, upon the felonious charge of assault with a deadly weapon with intent to kill inflicting serious bodily harm. That the petitioner at first would not plead guilty to the charge, but upon being informed by the Solicitor that if he would plead guilty, that he would be given a concurrent sentence, and would not get any more time. Thereupon the petitioner entered a plea of guilty and was sentenced to a 5 to 7 year sentence, to run concurrently with the sentence for which he was already serving. That the North Carolina Department of Correction since the two sentences of 5 to 7 were of equal length, started him on the sentence of 5 to 7 years received in Northampton County. That this deprived the petitioner of credit on this 5 to 7 years of the time he had already made on the first 5 to 7 years imposed in Wilson County, thereby the promise of concurrent sentence of not receiving anymore time given to the petitioner in exchange for the guilty plea was broken.

3. Petitioner contends that in light of recent decisions of the United States Supreme Court and the United States Fourth Circuit Court of Appeals, harsher sentencing after a sentence is vacated and a new trial is granted, and upon conviction at such retrial is violative of his constitutional rights. See: *Patton v. North Carolina* (4th Cir.), 318 F.2d 636 (1967) cert. den. 390 U.S. 905 (1968). See: *Benton v. Maryland*, 395 U.S. 784; *Pearce v. North Carolina*, 395 U.S. 711; *Waller v. Florida*, 397 U.S. 387.

4. Petitioner contends that although *Patton* and *Pearce* were decided upon a retrial after a post conviction judgment had invalidated Patton's original sentence, the tantamount effect relative to the instant case is a deprivation of basic constitutional rights and an implicit

double jeopardy violation constituting multiple punishment in violation of petitioner's constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. That the petitioner is informed and believes that this Court has already granted a writ of habeas corpus to a petitioner in the same situation as to the increase in sentence from District Court to Superior Court as this petitioner in *Torrance v. Henry* (E.D. N.C. late 1969 or early 1970), writ being granted by Judge Butler.

SECTION 11(b)

Petitioner contends that to sentence him to a harsher sentence in the Superior Court not only offends the principle of fair dealing in that the sentence exceeds in the minimum portion thereof his original sentence in the District Court by 4½ years, and 6½ years on the maximum, but to change it from a misdemeanor in District Court to a felony in Superior Court, after the District Court had accepted the guilty plea to a misdemeanor, compounds the injury to his rights, as denoted in *Patton v. North Carolina, supra*, the Court stated:

"The risk of denial of credit, or the risk of a greater sentence, or both on retrial, may prevent defendant who have been unconstitutionally convicted from attempting to seek redress. For this reason, the District Court declared that predicating Patton's constitutional right to petition for a fair trial on the fiction that he had consented to a possibly harsher punishment, offends the due process clause of the Fourteenth Amendment."

Whereupon, as specified in *Patton*, by the Court, quoting from *Fay v. Noia*, 372 U.S. 391 (1963):

"The law should not, and in our judgment does not place the defendant in such an incredible dilemma."

And further in *Patton* the Court stressed:

"North Carolina deprives the accused of the constitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It *may not* exact this price. Enjoyment of a benefit or protection provided by law cannot be conditioned upon the 'waiver' of a constitutional right." (emphasis added.)

Petitioner's rights were severely impinged by this subsequent relinquishment of his *lighter* District Court sentence of 6 months whereby he was placed in jeopardy of receiving a harsher sentence. And did receive a harsher sentence of 5 to 7 years. Petitioner's argument is that the connotation inherent in this system of arbitrary and restrictive retrial measures, as practiced by the State of North Carolina, can only be that such is, and should be so deemed, offensive to the administration of fair and impartial justice.

Wherefore, petitioner prays that this Court will grant relief in this matter to the end that the 5 to 7 year sentence imposed upon the petitioner at the Superior Court retrial of the District Court conviction in this matter will be set aside or vacated and the Respondent ordered to re-sentence the petitioner to a sentence of not more than six months, or that since the six months sentence to be served in this case has long expired, that the Court issue the Writ of Habeas Corpus, and wipe this unconstitutional 5 to 7 years off the records, and that the Court grant such other, further, and different relief as to the Court may seem just and proper under the circumstances.

RELEVANT PORTIONS OF
AMENDMENT TO APPLICATION FOR
WRIT OF HABEAS CORPUS

* * * * *

"The petitioner contends that his constitutional rights secured to him by the Fifth and Fourteenth Amendments to the United States Constitution, were violated and abridged by the imposition of a harsher sentence for a greater offense upon the re-trial from the Northampton District Court conviction and 6 months sentence for a misdemeanor to the felony charged in Northampton Superior Court and imposition of a 5 to 7 year sentence, as this constituted both double jeopardy and a denial of due process of law. (This is a clarification and modification of the two grounds set out in Section 10(a) and 10(b))."

* * * * *

The petitioner contends that the denial of credit to him as time served upon the sentence imposed at the August 1968 Session of Wilson County Superior Court of the time spent in physical custody and confinement after he was placed in jeopardy for the offenses resulting in his convictions is violative of constitutional rights secured to him by the 5th, 8th and 14th Amendments to the United States Constitution."

* * * * *

1. That the petitioner was brought to trial at the August 20, 1969 Session of the District Court of Northampton County upon the misdemeanor charge of assault and upon conviction was sentenced to a term of six months. (That the petitioner was told at the time of trial that it was to run concurrently, but later due to the fact that he was informed back at the Unit that it was consecutively he appealed to the Superior Court.)

2. That the petitioner was brought to trial upon the re-trial in this matter on October 29, 1969 in Northampton Superior Court upon the felony charge of assault with a deadly weapon with intent to kill inflicting serious bodily harm. (That upon being informed by the Solicitor Mr. Burgwyn and his Attorney Thomas W. Henson, that if he would plead guilty that he would not get any more time than he then had, and that the Judge was going to go along with this, the petitioner allowed and assented to a plea of guilty.)

3. That as indicated by the Judgment and Commitment in this cause, Judge Ragsdale, who had been recently appointed a Superior Court Judge at that time thought he was not giving the petitioner any more time. See Judgment and Commitment, attached hereto as Appendices Page A-1:

"It is ADJUDGED that the defendant be imprisoned for the term of not less than five (5) nor more than seven (7) years in the State Prison at Raleigh under the supervision of the North Carolina Department of Corrections. This sentence to run *concurrently* and *together* with the sentence for forgery which the defendant is now serving."

That it is clear from the Judgment that Judge Ragsdale did not think he was giving the petitioner any more active time. But due to the nature of North Carolina Law, this sentence was started by the Department of Correction on October 29, 1969, which meant in toto that the petitioner was getting a sentence of One (1) year and five (5) months and one (1) day more active time to be served by him, i.e. he was arrested on the Wilson County charges May 28, 1968 and it is plain that from May 22, 1968 until October 29, 1969 is a span of 17 months and 1 day.

That as a matter of law, the 5 to 7 years imposed in Northampton Superior Court upon the felony charge

after the petitioner had been convicted in Northampton District Court of a misdemeanor and a six month sentence imposed is constitutionally defective. See: The companion case of *Rice v. North Carolina*, 434 F.2d 297 (1970); *Wood v. Ross (Rose)*, wherein it was held that the imposition of a harsher sentence for a greater offense upon retrial constituted both double jeopardy and a denial of due process.

That the Court in the Order entered in this cause, asked for the reasons for this court not to grant a new trial in this matter. It is clear from the face of the record in this cause that the State of North Carolina has no legitimate interest in a retrying of this cause, in that: It is clear that the new trial would have to upon (sic) a misdemeanor in the Superior Court and that the Superior Court would be held to the imposition of a concurrent sentence in this matter, as clearly the trial Judge in this matter at the first trial in Superior Court stated unequivocally that the sentence he was imposing was both concurrent "and together with the sentence for forgery which the defendant is now serving" (A-1).

That it would be clearly vindictive action, if he the petitioner upon trial de novo in this matter was given a consecutive sentence in the Superior Court forbidden by *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). That a two year concurrent sentence imposed in this matter effective as of the original trial date of October 29, 1969, which it must be constitutionally would have no effect in this matter, and therefore the State of North Carolina has no legitimate reason for wanting a new trial in this matter, as such would be a mere formality and of no real substance.

* * * * *

The petitioner was arrested on the Wilson County charges on May 28, 1968 and held in jail until the trial

date in this matter of August 29, 1968, he then took an appeal to the North Carolina Court of Appeals, that upon the finding of "No error" the petitioner was committed to prison on January 15, 1969.

The petitioner spent from May 28, 1968 until August 29, 1968 awaiting trial in this matter of the Wilson County sentence in custody and confinement.

The petitioner spent from August 29, 1968 until January 15, 1969 in custody and confinement awaiting the appeal determination.

Since the petitioner has no state remedy as to the jail time credit in this matter, and this matter should be decided at one time, it is respectfully requested that this Court rather than have the petitioner have to seek further relief decide this whole matter at one time. Since upon being allowed credit on the Wilson Court Superior Court sentence of 5 to 7 years of the time spent from May 28, 1968 until January 15, 1969, it appears that the petitioner has already served flat time a period of 4 years and 1 Month and 7 days as of the date of the filing of this action (July 5, 1972). That this 4 years and 1 month and 7 days far exceed the good time release of this petitioner if he is credited with the gained time he already has accumulated in this matter. That he has already exceeded his minimum release date by over a year.

That the petitioner asks this court to apply applicable recent conceptual developments in the constitutional case law principles governing the relief sought herein and grant the petitioner credit upon the 5 to 7 years imposed in Wilson Superior Court in August, 1968 for uttering a forged instrument the time from May 28, 1968 until trial date spent in custody and confinement and the time spent on appeal from August 29, 1968 until January 15, 1969 (the current commitment date as credit as time served toward his release date, his parole eligibility date,

his honor grade eligibility date and other privileges accruing solely on the basis of time served. The total time sought is 7 months and 18 days credit as time served on the present commitment date of January 15, 1969 for this 5 to 7 years from Wilson County.

**DECISION OF THE
UNITED STATES DISTRICT COURT**

The decision of the United States District Court is set out in the Petition for Certiorari at pages 12-20.

**DECISION OF THE
COURT OF APPEALS**

The decision of the Court of Appeals for the Fourth Circuit is set out in the Petition for Certiorari at page 8.